No. 17-1154

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARQUETTE COUNTY ROAD COMMISSION,

Appellant,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; SUSAN HEDMAN, in her official capacity as Administrator of Region V of the United States Environmental Protection Agency, and UNITED STATES ARMY CORPS OF ENGINEERS,

Appellees.

On Appeal from the United States District Court
for the Western District of Michigan
Honorable Robert Holmes Bell, District Judge
Case No. 2:15-cv-93

APPELLANT'S PETITION FOR REHEARING OR REHEARING *EN BANC* UNDER FEDERAL RULES OF APPELLATE PROCEDURE 35 AND 40

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QUESTION PRESENTED

Whether an EPA veto of a wetland-fill permit otherwise approved by a state pursuant to the Clean Water Act (CWA or Act), is not reviewable in Court as final agency action pursuant to *Bennett v. Spear*, 520 U.S. 154 (1997), and Section 704 of the Administrative Procedure Act, even though *Sackett v. EPA*, 566 U.S. 120 (2012), and *U.S. Army Corps of Engineers v. Hawkes*, 136 S. Ct. 1807 (2016), as applied, would hold that the Road Commission could seek judicial review of the EPA veto on the merits immediately.

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INTRODUCTION AND RULE 35(b)(1) STATEMENT

This petition raises an exceptionally important question of federal jurisdiction: Whether an EPA veto of a wetland-fill permit otherwise approved by a State pursuant to the Clean Water Act (CWA or Act), is not reviewable in Court as final agency action pursuant to *Bennett v. Spear*, 520 U.S. 154 (1997), and Section 704 of the Administrative Procedure Act, even though *Sackett v. EPA*, 566 U.S. 120 (2012), and *U.S. Army Corps of Engineers. v. Hawkes*, 136 S. Ct. 1807 (2016), as applied, would hold that the Road Commission could seek judicial review of the EPA veto on the merits immediately.

First, rehearing or rehearing *en banc* is necessary to maintain consistency with Supreme Court precedent—specifically, *Sackett* and *Hawkes*. Second, rehearing *en banc* is necessary because the case is one of exceptional importance in that states that have exercised their right to assume authority within the CWA § 404 permitting process should not have their decisions to approve § 404 permits rejected by the EPA for arbitrary and capricious reasons. To hold otherwise is inconsistent with the intent of Congress in creating the state-permitting process. Fed. R. App. P. 35(b)(1)(A)-(B), and 40. This Court rarely rehears a case *en banc*. But this is an exceptional case. And the opinion is out of step with this Court's recent precedents and those of other circuits, not to mention the Supreme Court. This is an excellent case for *en banc* review.

REASONS FOR GRANTING REHEARING

This case arises from the Marquette County Road Commission's decision to construct a road, County Road 595 (CR595), in Marquette County, Michigan—a rural county in the state's upper peninsula. *Marquette County Road Comm'n v. EPA*, 188 F. Supp. 3d 641, 643 (W.D. Mich. 2016). To do so, the Road Commission needed to fill 25 acres of wetlands. *Id*. To fill the wetlands, the Clean Water Act (CWA or Act) required the Road Commission to obtain a § 404 wetland-fill permit, 33 U.S.C. § 1344. *Id*. CR595 promised substantial economic benefits and improved public safety because large trucks hauling minerals through small towns and along college and school campuses in the county could instead use CR595 and avoid these danger zones (Affidavit of James Iwanicki, P.E. Opposing Motion to Dismiss, RE 23-1, Page ID #1312-13, ¶¶ 4-5). The community, local governments, key state agencies, and state and federal legislators from both parties supported the plan (*id*. Page ID #1313, ¶ 5).

States are authorized to approve a § 404 permit if the permit applications meet certain conditions. *Id*. EPA retains oversight authority when the state takes on this authority. *Id*. Michigan has assumed that responsibility pursuant to the Act. Although Michigan stood ready, willing, and able to issue the § 404 permit, the EPA repeatedly objected to its issuance, based on arbitrary and capricious reasons. As a result of EPA's refusal to allow Michigan to grant the permit, the Road

Commission—if it wanted the road project—had to start *anew* on obtaining a permit from the U.S. Army Corps of Engineers.

The Road Commission instead sought judicial review of the EPA's effective denial of the § 404 permit, relying on the fact that (i) the EPA's work had consummated by way of that denial; and (ii) authority over the Road Commission's project now would transfer to the Corps. The panel asserts that the permit process then simply *continues* with the Corps, pursuant to the Act, and that the Road Commission abandoned that process. But the panel's assertions assume facts not plead contrary to the standard of review at the motion to dismiss stage from which this appeal arose, and facts that are demonstrably not true. More importantly, the panel's decision ignores *Sackett*'s admonition that the APA remedy for agency action, pursuant to Section 704 of the APA, is usually not sought after a later decision by a separate agency. The Court must revisit the decision in order to return the proper interpretation of *Sackett* and *Hawkes*, the interpretation that this Court recognized in *Berry v. U.S. Dep't of Labor*, 832 F.3d 627, 633 (6th Cir. 2016), when it applied *Sackett* and *Hawkes* in the context of a labor case.

Footnote 5 of the panel's opinion best captures the panel's error. It states: "As counsel for EPA and the Corps noted at oral argument, the Road Commission could to this day continue to pursue a Section 404 permit for County Road 595 by submitting its most recent revised application to the Corps." But that gives *decisive*

weight to a *weightless* point. In *Sackett*, the Sacketts—faced with an EPA compliance order they found arbitrary and capricious—were required to fill their property, *apply for a CWA permit from the Corps*, and then and only then could they challenge the original compliance order. The government asserted that this was a "step in the deliberative process," *Sackett*, 566 U.S. at 129—just as the panel ruled here that this was a "continuing process." But the Supreme Court brushed aside whether it was a step in the process, in favor of holding that the compliance order was reviewable immediately because it was final as to the compliance order and it had consequences for the Sacketts. *Id*. at 130-31. Likewise here, the objections lodged to the State-approved § 404 permit should be reviewable because those objections terminated that permit—that is, the objections had legal consequences, per *Bennett*. The objections were final as to the permit the State was ready to issue.

Likewise in *Hawkes*, after Hawkes Company received its affirmative Jurisdictional Determination (JD), it was required to pursue a CWA permit from the Corps. *There was a process*. There, the same agency that issued the JD was then to decide whether to give a permit to Hawkes Company. In that sense, the injury was lesser in that at least one agency was in charge of the "permitting process" that involved whether Hawkes needed a permit. Only after Hawkes applied for the permit could it challenge whether it needed a permit. The Supreme Court rejected the

government's argument that this ongoing "process" meant that Hawkes Company could not appeal the JD. *Hawkes*, 136 S. Ct. at 1816.

Elevating "continuing process" over the substance of the decision being challenged is where the panel erred. What matters is that the Road Commission had a § 404 permit in its grasp and the EPA took it away. That final decision imposed consequences on the Road Commission, thus meeting the requirements of *Bennett v. Spear* and § 704 of the APA to allow for judicial review immediately.

I. Rehearing *En Banc* Is Warranted To Resolve the Conflict Between *Sackett*, *Hawkes*, and the Panel Decision

In furtherance of the "generous review provisions" of the APA, *Abbott Labs v. Gardner*, 387 U.S. 136, 140-41 (1967) (quoting *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955), and the Act's strong presumption of reviewability, the Supreme Court decisions take a pragmatic approach to finding agency action is final under the APA. *See Hawkes*, 136 S. Ct. at 1815; *Abbott Labs*, 387 U.S. at 148-50; *accord Bell v. New Jersey*, 461 U.S. 773, 779 (1983); and *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 200-01 (1983). Here, the EPA veto of the § 404 permit the State wanted to issue was both final agency action and it determined rights and obligations; likewise, legal consequences flowed from the veto. That is the *sine qua non* of a reviewable decision under § 704 of the APA.

But the panel decision ignored the "generous review provisions" of the APA in favor of a determination that the "continuing process" of seeking a permit—first from the State, and then if not successful with the State from the Corps—statutorily precluded following the APA. That was error as a matter of law and a failure to apply *Sackett* and *Hawkes* correctly—actually, a failure to apply them at all.

The test for determining final agency action under the APA is generally described as a two-prong analysis: "First, the action must mark the 'consummation' of the agency's decisionmaking process." And second, "the action must be one by which 'rights or obligations have been determined,'" or from which "'legal consequences will flow.'" *Bennett*, 520 U.S. at 177-78 (citations omitted). The second prong of the *Bennett* test is written in the disjunctive. Even if new "legal consequences" do not flow, the agency action may still be final if it determines "rights" or "obligations." The circumstances here demonstrate that the EPA's work was consummated as to the § 404 permit the State intended to issue, and consequences as well as rights or obligations were determined.

A. EPA's Objections Marked the Consummation of EPA's Work

The panel decision failed to account for the fact that, *as to the State-approved § 404 permit*, the permit was denied by operation of EPA's arbitrary and capricious objections. That permit was denied and the Road Commission had to start a new permit process with the Corps. And while EPA may have more work to do as to a

new permit if the Road Commission had submitted a new one to the Corps, there was no more work for EPA to do as to the § 404 permit that EPA vetoed. The agency's decisionmaking process as to the State-approved § 404 permit was consummated. *Sackett* demonstrates as much.

In *Sackett*, EPA issued a compliance order asserting the Sacketts had filled wetlands to build a home on their lot near Priest Lake, Idaho, without a federal permit in violation of the CWA. *Sackett*, 566 U.S. 120. Like the Road Commission, the Sacketts contested EPA's arbitrary and capricious action and sought review of EPA's final decision in court. *Id*. at 122. The government filed a motion to dismiss for lack of subject matter jurisdiction, which was granted—just as happened here.

Relying on *Bennett*, the Supreme Court had no trouble finding that the compliance order "marks the 'consummation' of the agency's decision making process." *Sackett*, 566 U.S. at 127. The reasoning the Court used is instructive. The Court held the order marked the consummation of the agency's decisionmaking process because "the 'Findings and Conclusions' that the compliance order contained were not subject to further agency review." *Id*. at 127-28. That circumstance mirrors the instant case, where the EPA objections to the § 404 permit *the State intended to issue* will *never* be subject to further agency review. That permit denial is final and EPA's work is done as to that permit. The Corps—a separate agency—will review a *new* permit application, just as in *Sackett* the Corps would

have reviewed the Sacketts' new permit application under the government's theory of the case. EPA acted arbitrarily and capriciously in *Sackett* when it issued the compliance order, and the EPA acted arbitrarily and capriciously here when it vetoed the § 404 permit the State intended to issue pursuant to its authority under the CWA as written by Congress. In *Sackett*, the Supreme Court said the Sacketts could resort to the courts to challenge EPA for its final decision as to the compliance order. *Sackett*, 566 U.S. at 130-31. So it must be here as to the § 404 permit the EPA vetoed.

Under a plain reading of the APA, this should end the inquiry. The APA states in relevant part that "final agency action[s] for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. This language is not ambiguous, and under the standard norms of statutory interpretation, the term "final" should take its ordinary meaning (i.e., conclusive or decisive). *See Harrison v. PPG Indus., Inc.*, 446 U.S. 578 (1980) (holding the phrase "any other final action" in § 307(b)(1) of the Clean Air Act is clear and is to be construed in accordance with its literal meaning so as to reach any action of the Administrator that is final); *see also Sackett*, 566 U.S. at 129 ("[T]he APA provides for judicial review of all final agency actions, not just those that impose a self-executing sanction."). Such a straightforward reading of the APA would give due deference to the presumption of reviewability on which the Act rests. *Id*.

B. Second Prong of *Bennett* Met Because Rights or Obligations and Legal Consequences Flow From the EPA Veto

Under the second *Bennett* prong, "the action must be one by which 'rights or obligations have been determined,'" or from which "'legal consequences will flow.'" *Bennett*, 520 U.S. at 178 (quoting *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)). Here, the panel did not even address this prong of *Bennett*. If it had done so, then it would have had to concede that the second prong of *Bennett* is met on the instant case's facts.

1. EPA Veto Had Legal Consequences for the EPA and the Road Commission

In *Hawkes*, to demonstrate that a Corps affirmative jurisdictional determination has legal consequences, the Supreme Court first looked to a circumstance where the Corps determined that jurisdictional waters were absent (a/k/a a "negative JD") from a property, *Hawkes*, 136 S. Ct. at 1814. Where the Corps issues a negative JD, legal rights and obligations flow—the landowner can use his property without a permit, and the agencies cannot bring an enforcement action for violating the Clean Water Act. *Id*. The Court then looked to the circumstance before it, where the Corps had made an affirmative jurisdictional determination. *Id*. The Court said that affirmative JDs have legal consequences because "[t]hey represent the denial of the safe harbor that negative JDs afford" and warn applicants "that if they discharge pollutants onto their property without

obtaining a permit from the Corps, they do so at the risk of significant criminal and civil penalties." *Id*. at 1815.

That situation mirrors the circumstances the Road Commission finds itself in here having had its State-approved permit vetoed by the EPA. Here, if EPA had not vetoed the permit, then the Road Commission would have received the permit and could have gone forward with its CR595 project without fear of an enforcement action. The permit would have the force and effect of both state and federal law. *See*, *e.g.*, 33 U.S.C. § 1344(j), (p); 40 C.F.R. § 233.50; 40 C.F.R. § 233.70. The permit would have been binding for a period of five years and, thus, like a negative JD, would have had legal consequences. 40 C.F.R. § 233.23(b). Similarly, an affirmative JD—what the Hawkes Company received—amounts to the veto that the Road Commission received. Just like the legal consequence of an affirmative JD (i.e., denial of the safe harbor and resort to the Corps' permitting process), an EPA veto denied the Road Commission the proposed permit and warns the Road Commission that if it fills the property without obtaining a permit from the Corps, it does so at the risk of significant criminal and civil penalties. Therefore, like the affirmative JD in *Hawkes*, which divested the plaintiff of the safe harbor and created the need for plaintiff to seek a permit from the Corps, the EPA's veto in this case divested the Road Commission of the permit proposed by the State and created the need for the Road Commission to seek a permit from the Corps.

In reality, the EPA veto left the Road Commission in an even worse position than Hawkes Company; at least Hawkes Company could have applied for the permit and then upon receiving a final decision on that permit application sued the Corps because the predicate jurisdictional determination was arbitrary and capricious. *Not so here*—here, no court will likely *ever* review the EPA's predicate decision to reject the state permit, unless this Court reverses the lower court's decision. If the Road Commission must seek a Corps permit, the EPA veto may be deemed moot or outside the scope of the later challenge to the Corps' permit decision. *See Sackett*, 566 U.S. at 127 ("[T]he remedy for denial of action that might be sought from one agency does not ordinarily provide an 'adequate remedy' for action already taken by another agency."). Moreover, the EPA veto will be no more final after a Corps permit decision than it is now. As in *Hawkes*, the Corps permit process does not add anything, legally or factually, to the challenged agency action in regards to the § 404 permit the state intended to issue. The APA specifically provides that agency final decisions that have no other adequate remedy in court are subject to judicial review. 5 U.S.C. § 704. Here, the Road Commission has no way, let alone an adequate way, to challenge the EPA decision to veto the State-approved § 404 permit.

2. The Veto Imposes a Legal Obligation on the Road Commission

In this case, as in *Sackett* and *Hawkes*, by reason of the agency action at issue, the Road Commission has the obligation to obtain a permit *from the Corps* if they

wish to proceed with the road project. The Road Commission had no such obligation prior to the EPA veto. Without filing that new permit application with the Corps, no road project will ever take place. If EPA had not vetoed the State permit, then the road project would already be underway, without the Road Commission ever asking for a permit from the Corps. Like the Sacketts, the Road Commission has "little practical alternative but to dance to the EPA's tune" and apply for the Corps permit. *Sackett*, 566 U.S. at 132 (Alito, J., concurring). "In a nation that values due process, not to mention private property, such treatment is *unthinkable*." *Id*. (emphasis added). Yet the panel's decision has rendered the unthinkable the law of the circuit.

3. The Veto Denies the Road Commission a Legal Right

This is an appeal from a judgment following a 12(b)(6) dismissal case wherein the facts are taken as asserted. *See Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (In a motion to dismiss, "a court must accept a complaint's allegations as true."). The complaint alleges that EPA based its veto on arbitrary and capricious objections to the permit. (Complaint, RE 1, Page ID #75-79, ¶¶ 311-25.) Taking those facts as true, the EPA should have allowed the State to issue the § 404(j) permit. Therefore, EPA's implicit demand that the Road Commission pursue a new permit from the Corps flowed from the veto, not from the CWA. But for the veto, the Road Commission would have built the road without a Corps permit. The veto changed

the legal regime, denied the Road Commission a legal right, and is final agency action under the APA.

C. APA Requirement That There Is No Other Adequate Remedy in Court Is Met

Final agency action is judicially reviewable under the APA if there is "no other adequate remedy in a court." 5 U.S.C. § 704. There is no such remedy for an EPA veto of a State-approved permit like the permit the State was prepared to issue to the Road Commission. The Road Commission's only choice is to either give up on the project or start the permit process over with the Corps. The panel decision concedes this but says the Clean Water Act requires it; but that misunderstands the issue. That the CWA describes a process does not mean final agency decisions made within the process are not reviewable under the APA. *Sackett*; *Hawkes*. The EPA's arbitrary objections to the State-approved § 404 permit were final; that permit will never be resurrected. There is no remedy in court, let alone an adequate remedy, to address the arbitrary and capricious decision of the EPA to nix the State-approved permit. Under the logic of *Sackett* and *Hawkes*, and the pragmatic interpretation of the APA that Supreme Court precedent compels, the panel decision simply erred on an exceptional question, and to remain consistent with Supreme Court precedent this Court must vacate the decision.

II. The Panel Opinion Should Be Reheard or Vacated

Even if the Court does not rehear the case *en banc*, the panel should rehear it and withdraw its decision for two reasons.

First, it should vacate its decision because the panel's reasoning contravenes the Supreme Court's instruction that courts take a pragmatic approach when considering the finality of agency action. *See Hawkes*, 136 S. Ct. at 1815 (citing *Abbott Labs.*, 387 U.S. at 149) ("The cases dealing with judicial review of administrative actions have interpreted the 'finality' element in a pragmatic way."). It is illogical to say the EPA's objections to the State's § 404 permit were tentative because the EPA might, years later, lodge different objections to a different permit proposed by the Corps in response to a new permit application.

Friends of Crystal River v. EPA, 35 F.3d 1073, 1080 (6th Cir. 1994), holds that once the EPA's objections crystalize into what amounts to a veto, the EPA is "completely divest[ed]" of jurisdiction and may neither reinvest the State with permitting authority nor issue a permit to Plaintiff. But under the panel's reasoning here, no proposed permit of the Corps would ever be final since EPA has the authority to issue a 404(c) veto "whenever" EPA determines the discharge under review will have an "unacceptable adverse effect" on identified natural resources, even if that is post-permit. *See Mingo Logan Coal Co. v. EPA*, 714 F.3d 608, 615 (D.C. Cir. 2013) ("[T]he text of section 404(c) does indeed clearly and

unambiguously give EPA the power to act post-permit."). But that's obviously not the case. That the EPA retains this authority does not render a Corps decision to grant or deny a permit non-final and non-appealable. Likewise, the EPA decision to arbitrarily object to the State-approved § 404 permit should be appealable because the EPA's work is consummated as to that permit; it may retain oversight authority as to a later Corps permit, but that has no bearing on the permit at issue here.

And second, the panel should vacate its decision because its reasoning does not even hold internally when the facts of the complaint are taken as true. The panel holds that a new permitting process starts if, and only if, the applicant submits to the Corps a new application for permit complying with the Corps' substantively and procedurally different regulations. Plaintiff, in this case, was not permitted to file with the Corps the *same* application it submitted to the State. Rather, the Corps informed Plaintiff that its regulations required Plaintiff to submit a *new* application containing information different than that contained in Plaintiff's state application. (Affidavit of James Iwanicki, P.E., ECF No. 23-1, Page ID #1314-1315, ¶¶ 16-19).

CONCLUSION

The Road Commission has not shoehorned this case into the *Sackett* and *Hawkes* paradigm. The panel has instead ignored the implications of those decisions for the instant case. The case must be reheard, the panel opinion vacated, and a decision consistent with *Sackett* and *Hawkes* reached.

DATED: May 2, 2018.

Respectfully submitted,

/s/ Mark Miller

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CERTIFICATE OF COMPLIANCE

I certify that (1) this petition complies with the word-count limitation set forth in Rule 35(b)(2) and Rule 40(b)(1) of the of the Federal Rules of Appellate Procedure, and contains 3,833 words; and (2) in compliance with Rule 32(a)(5)'s typeface requirements and Rule 32(a)(6)'s type style requirements, this petition has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point font and Times New Roman typeface.

/s/ Mark Miller
MARK MILLER

CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Mark Miller
MARK MILLER

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No. 17-1154

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARQUETTE COUNTY ROAD COMMISSION, Plaintiff-Appellant, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., Defendants-Appellees.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

BEFORE: BATCHELDER, GRIFFIN, and WHITE, Circuit Judges.

ALICE M. BATCHELDER, Circuit Judge. In 2011, Plaintiff-Appellant Marquette County Road Commission ("Road Commission") applied to Michigan's permitting authority—Michigan Department of Environmental Quality ("MDEQ")—for a permit to fill 25 acres of wetlands to construct County Road 595. *See* 33 U.S.C. § 1344. MDEQ wanted to issue the application, but the U.S. Environmental Protection Agency ("EPA")—which the Clean Water Act ("CWA") empowers to oversee state-run permitting programs—objected to various aspects of the proposal. Despite the Road Commission's numerous attempts to revise the permit application over the following months, EPA remained unsatisfied. Eventually, authority to resolve the permit application transferred to the Army Corps of Engineers ("Corps"). 33 U.S.C. § 1344(j); 40 C.F.R. § 233.50(j). Frustrated with the time and expense of the process, the Road Commission declined to continue the permit review process before the Corps and instead

brought claims under the Administrative Procedure Act ("APA") against EPA and the Corps based on EPA's refusal to approve the issuance of the application and the Corps' requirement that the Road Commission re-submit its application materials to continue the process. The district court determined that neither of these agency actions constituted a final agency action. The district court also rejected the Road Commission's alternative arguments that EPA's objections were reviewable, non-final agency action and that completion of the Corps review process would have been futile. The district court dismissed the suit. We agree and AFFIRM.

I.

Section 404 of the CWA regulates the release of dredged and fill matter into waterways, including wetlands. *See* § 33 U.S.C. § 1344. Generally, the Secretary of the Army oversees Section 404 permitting through the Corps. *See id.* However, the CWA also allows states to administer their own Section 404 permitting programs subject to federal approval and oversight by EPA. *See id.* § 1344(g)-(j); 40 C.F.R. §§ 233.16, 233.20, 233.50, 233.52, 233.53. Michigan is one of two states having federal approval to operate its own permitting program.

State-run permitting programs such as Michigan's are subject to rigorous EPA oversight. *See* 33 U.S.C. § 1344(j); 40 C.F.R. § 233.50. For example, states must submit copies of each permit application to EPA and notify EPA of any action that they take with respect to these applications. 33 U.S.C. § 1344(j).[1] If EPA intends to comment on a state's handling of an application, it must notify the state within thirty days and submit comments to the state within ninety days. *Id.* Once EPA notifies a state that it intends to comment on the permit application, a state may not issue a permit until it receives the comments or ninety days pass, whichever

[1] EPA also functions as a liaison between the state and other involved federal agencies. EPA must provide copies of each application it receives to the Corps and the Department of the Interior (through the U.S. Fish and Wildlife Service), and is responsible for integrating comments from these other federal agencies into its comments to the state. *Id.* at § 1344(j).

comes first. *Id*. If EPA objects to the state's issuing a permit, a state "shall not issue the permit unless [it] has taken the steps required by [EPA] to eliminate the objection," regardless of how much time has passed. 40 C.F.R. § 233.50(f); *accord* 33 U.S.C. § 1344(j). EPA must provide reasons for objecting to the issuance of a permit "and the conditions which such permit would include if it were issued by [EPA]." 33 U.S.C. § 1344(j); *accord* 40 C.F.R. § 233.50(e).

A state has limited options when it wishes to issue a permit to which EPA objects. It may (i) issue a revised permit that eliminates EPA's objection; (ii) deny the permit; or (iii) request a public hearing. *See* 33 U.S.C. § 1344(j); 40 C.F.R. § 233.50(f)-(g). If the state does not take one of these three actions within ninety days of EPA's objection, authority to make a final decision regarding the permit transfers to the Corps. 33 U.S.C. § 1344(j); 40 C.F.R. § 233.50(j). If the state requests a public hearing, EPA must conduct the hearing and then "reaffirm, modify, or withdraw the objection or requirement for a permit." 40 C.F.R. § 233.50(h). If EPA reaffirms or modifies its objection, the state has essentially the same recourse it had before the hearing: it must within thirty days either issue a revised permit that eliminates EPA's objections or deny the permit. 40 C.F.R. § 233.50(f)-(j). If the state does not take either of these actions, authority to review and make a decision regarding the permit transfers to the Corps. 33 U.S.C. § 1344(j); 40 C.F.R. § 223.50(j).

II.

The Section 404 permitting process has the potential to be onerous, and proved to be so for the Road Commission. The Road Commission submitted its permit proposal for County Road 595 to MDEQ—the state agency that runs Michigan's program—in October 2011 and a revised proposal in January 2012.[2] On April 23, 2012, after consulting with the Corps and the

[2] EPA, the Corps, and the U.S. Fish and Wildlife Service all received copies of the Road Commission's revised permit application, per statutory directives.

U.S. Fish and Wildlife Service, EPA objected to the Road Commission's proposal. EPA's objections asserted that the Road Commission failed to comply with the requirements of the CWA because, among other things, it did not demonstrate that the proposed road was the "least environmentally damaging practical alternative."

Over the next several months the Road Commission revised its proposal numerous times based on conversations between it, MDEQ, and EPA. Despite the Road Commission's attempts to resolve EPA's objections, EPA remained unsatisfied and believed the proposal failed to meet CWA standards. MDEQ, however, thought the most recently revised proposal met CWA standards and wished to grant the Road Commission a permit.

MDEQ requested a public hearing, which EPA held on August 28, 2012. Following the hearing, MDEQ sent a letter to EPA urging EPA to remove its objections so that it could grant the permit. MDEQ contended that "the Road Commission ha[d] been responsive to the concerns expressed in [MDEQ's] and [EPA's] correspondence . . . including the [EPA's] April 23, 2012, objection letter." Since EPA's objection, the letter stated, the Road Commission had expanded its explanation "of the alternatives analysis that demonstrate[s] the proposed route is the least environmentally damaging practicable alternative to achieve the project purpose," "effectively minimized . . . impacts to streams via shorter and wider stream crossings or bridges," "narrowed or removed [the road footprint] across the rare and imperiled wetlands," and "modified [the proposed road route] in several locations to avoid critical wetlands and further reduce overall impacts." MDEQ stated that it believed these improvements adequately addressed EPA's and MDEQ's comments and brought MDEQ "to the point [where] Michigan will soon be in a position to issue a permit." In closing, the letter "urge[d] []EPA to remove their objection to the MDEQ issuing a permit for construction of Marquette County Road 595."

Nearly three months passed before EPA responded to MDEQ's letter. On December 4, 2012, EPA informed MDEQ that it would withdraw its objection that the Road Commission's proposal was not the least harmful alternative, but continued to object to the issuance of a permit because the Road Commission had still not provided "adequate plans to minimize impacts" or a "comprehensive mitigation plan that would sufficiently compensate for unavoidable impacts."

EPA's continued objection triggered the thirty-day deadline for MDEQ to either resolve EPA's objection and grant the permit, or deny the permit. *See* 40 C.F.R. § 233.50(f)-(j). On the eve of the statutory deadline, MDEQ notified EPA that it was working with the Road Commission to address EPA's objections, but "the short time frame allowed by statute and the complexity of the issues remaining" prevented MDEQ from issuing a permit. MDEQ acknowledged that because it did not resolve EPA's objections in time to grant the permit and declined to deny the permit outright, the CWA directed that "authority to process the permit application . . . transferred to the [Corps]." *See* 33 U.S.C. § 1344; 40 C.F.R. §233.50(f)-(j).

Upon assuming authority over review of the permit, the Corps required the Road Commission to re-submit its application to continue the permitting process.[3] The Road Commission declined to re-submit and the permitting process for County Road 595 came to a halt.

[3] Both in its briefing and at oral argument, the Road Commission characterized the submission requested by the Corps as a "new application." At oral argument, the Road Commission asserted that the application requested by the Corps would have "a host of factors that were different from what the DEQ looked at," including "different definitional terms" and the fact that the Road Commission "was going to have to comply with [the National Environmental Policy Act,]" which counsel described as a "significant difference from the application process it had gone through with the DEQ." EPA and the Corps contest this characterization, asserting in briefing and at oral argument that the Corps required the Road Commission to re-submit its application in order to ensure that the Corps considered the proper and most-recent materials given the various revisions to the Road Commission's permit application. Counsel for EPA and the Corps further asserted that the substantive criteria to be considered by the Corps are identical to the criteria considered by MDEQ and the EPA because all the inquiries concern the requirements of § 404. We need not resolve this dispute.

The Road Commission initiated the instant litigation, filing a five-count declaratory judgment action in the United States District Court for the Western District of Michigan against the EPA (counts one through four) and the Corps (count five). The complaint alleged that: EPA's objections to the Road Commission's permit application were arbitrary and capricious (count one); EPA exceeded its delegated authority by issuing objections based on requirements that are not mandated by the CWA (count two); EPA's objections failed to list the conditions necessary for a permit to issue, as required by Section 404(j) of the CWA (count three); EPA did not follow the procedural requirements of Section 404(j) of the CWA (count four); and the Corps' improperly denied the permit application by failing to act on it (count five). For relief against EPA, the Road Commission requested that the court declare EPA's objections unlawful and restore permitting authority to the MDEQ. Against the Corps, the Road Commission requested that the court declare that the Corps' failure to take action constituted constructive denial and direct the Corps to grant a permit.

EPA and the Corps moved to dismiss the complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The district court granted the motion and dismissed the complaint in full. For the following reasons we affirm.

III.

A.

"[C]hallenge[s] to the availability of judicial review under the APA [are] properly analyzed under Federal Rule of Civil Procedure 12(b)(6) and whether [a] plaintiff has stated a valid claim for relief." *Berry v. U.S. Dep't of Labor*, 832 F.3d 627, 632 (6th Cir. 2016) (citing *Jama v. Dep't of Homeland Sec.*, 760 F.3d 490, 494 n.4 & 495 (6th Cir. 2014)). We review de

novo questions of statutory interpretation and a district court's order dismissing a complaint for failure to state a claim. *Id.*

"[A]gency action," as defined by the APA, "includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). Agency action is subject to judicial review when "made reviewable by statute" or—relevant here—when it is "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704; *see Berry*, 832 F.3d at 632. To be considered "final" under the APA an agency action must generally meet two conditions. *Berry*, 832 F.3d at 633 (citing *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016)). "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Hawkes Co.*, 136 S. Ct. at 1813 (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)); *see Berry*, 832 F.3d at 633.

In this appeal, the Road Commission asserts that EPA's objections constituted final, reviewable agency action. As to the first prong of the analysis—the consummation of the agency's decisionmaking process—the Road Commission asserts that EPA's objections served as a "veto" that completed EPA's involvement and denied a permit that MDEQ otherwise would have granted. This, however, is belied by the record and the statute.

Though the Road Commission characterizes EPA's objections as a "veto," the facts show that EPA's objections did not end the Road Commission's pursuit of a Section 404 permit. To the contrary, when EPA lodged objections, the permit review process continued precisely as directed by statute. The Road Commission repeatedly revised its permit application in its

attempt to eliminate EPA's objections. Eventually, MDEQ, disagreeing with EPA's assessment that the Road Commission's permit application failed to meet CWA standards, requested a public hearing. EPA held the hearing, after which it withdrew some objections and renewed others. MDEQ, finding itself unable to issue a permit that resolved EPA's remaining objections and unwilling to deny the permit outright, ceded review authority to the Corps. Only when the Road Commission, tired of the rigmarole the CWA imposes, declined to submit its most recent materials to the Corps did the Road Commission itself discontinue the permitting process.[4] As EPA conceded in briefing, "[h]ad MDEQ denied the permit or issued a permit with conditions resolving EPA's objection, the permitting process would have been at an end, and the Road Commission could then have sought review if it was dissatisfied with the result." In the absence of any decision from either agency to ultimately deny or grant the permit, however, we have nothing to review. *See Friends of Crystal River v. EPA*, 35 F.3d 1073, 1079 n.11 (6th Cir. 1994) (EPA objections to Section 404 permits are unreviewable because they are not final); *cf. Sackett v. EPA*, 566 U.S. 120, 127 (2012) (compliance order's findings and conclusions were final, because they were not subject to further review).[5]

Nor does the Road Commission's artificial attempt to divide the Section 404 permit process into two separate "permits"—a "state permit" and a "Corps permit"—show the consummation of a decisionmaking process. The CWA establishes one continuous application process to obtain a Section 404 permit, of which state-run permitting programs are one part. *See* 33 U.S.C. § 1344. The shift of review authority from MDEQ to the Corps is a midpoint, not a

[4] We sympathize with the Road Commission's frustration with the long, expensive, burdensome process it has endured. Unfortunately, it is the process the CWA requires, and one which must be fully completed before APA review can be triggered.

[5] As counsel for EPA and the Corps noted at oral argument, the Road Commission could to this day continue to pursue a Section 404 permit for County Road 595 by submitting its most recent revised application to the Corps.

new, separate, and distinct application process. *See id.* Here, the Section 404 permit process could have been consummated with a grant or denial by MDEQ, subject to EPA approval, or a grant or denial by the Corps. These two potential decision points do not equal two separately reviewable permit processes. And though the Road Commission has unquestionably endured a long, expensive, and frustrating permit application process, it voluntarily discontinued the process and did not receive any final determination.[6]

Finally, the Road Commission argues that because the Corps is a separate agency from EPA, the close of the MDEQ review and transfer of the application to the Corps fulfills the first prong of finality review because it marks the consummation of *EPA's* agency action. But EPA and the Corps are, by statute, charged to work together to assess permits throughout the review process. The Road Commission's parsing of "agency action" to mean each individual agency's actions is inconsistent with prior court precedent. *See Jama*, 760 F.3d at 496 ("Congress has delegated to specific government agencies the task of enforcing immigration laws and determining aliens' immigration statuses. *The agencies' decisionmaking process consummates when they issue a final decision* regarding the alien's immigration status." (emphasis added)). And even if this were not the case, EPA's involvement in the Section 404 permitting process does not end when review transfers to the Corps. *See* 33 U.S.C. § 1344(c); *see, e.g.*, *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 714-15, 717-18 (D.C. Cir. 2016); *cf. Michigan Peat v. EPA*, 175 F.3d 422, 428 (6th Cir. 1999) (finding final agency action where "[s]tatutorily, there was nothing left for the EPA to do once it signed off on the proposed permit").

[6] Though the Corps did request that the Road Commission submit a "new" application to continue the review process, counsel for EPA and the Corps asserted that this request was merely to ensure continued review of the most up-to-date permit application. The Road Commission's decision not to submit its most up-to-date materials to the Corps for continued review ended a long, but ultimately incomplete, Section 404 permit review process.

Because the Road Commission has failed to demonstrate that EPA's objections or the transfer of authority over the permit to the Corps consummated the decisionmaking process in the Section 404 permit proceeding, we need not analyze whether legal consequences flowed. The Road Commission has failed to show that the challenged actions constitute final agency action permitting this court's review under the APA.

B.

The Road Commission contends in the alternative that, even if EPA's objections are not final agency action under the APA, it is nonetheless entitled to judicial review of the merits of those objections under an exception established in *Leedom v. Kyne*, 358 U.S. 184 (1958). *Leedom* is a "narrow anomaly reserved for extreme situations," where agency conduct constitutes a patent violation of its delegated authority. *Shawnee Coal Co. v. Andrus*, 661 F.2d 1083, 1093 (6th Cir. 1981); *see also Friends of Crystal River*, 35 F.3d at 1079 n.13 (6th Cir. 1994). EPA's objections simply cannot be characterized as a patent violation of its authority, where the CWA explicitly allows EPA to object to a permit application "as being outside the requirements of this section [of the CWA], including, but not limited to, the [Section 404] guidelines developed under subsection (b)(1)." 33 U.S.C. § 1344(j). The Road Commission's attempt to paint the "outside the requirements" language of Section 404 as creating a narrow power to object only to certain matters, while leaving the rest to the state's discretion, is not supported by statutory or regulatory language. *See, e.g.*, 40 C.F.R. § 233.50(e) (permitting EPA objections based on "the Regional Administrator's determination that the proposed permit is . . . outside [the] requirements of the Act, these regulations, or the 404(b)(1) Guidelines.").

For *Leedom* to apply there must also be a showing that the aggrieved party would be "wholly deprived" of its statutory rights. *Detroit Newspaper Agency v. NLRB*, 286 F.3d 391, 397

(6th Cir. 2002). The Road Commission cannot make this showing, because it could simply continue the permit process before the Corps and eventually receive a final decision that is judicially reviewable.

C.

The Road Commission also argues in the alternative that it would have been futile for it to have continued the permit process before the Corps because the Corps had made up its mind and would reject any application from the Road Commission. To support this argument, the Road Commission relies on comments that the Corps made to the first revised application in March 2012, where the Corps questioned the stated purpose of the project and identified other deficiencies in the Road Commission's proposal. The Road Commission also refers to an email from an EPA employee to the Corps, in which the EPA employee stated sarcastically that it "looked like 'they' want to go to the [Corps] permit for [County Road] 595, EPA is such a job killer . . . hope the [Corps] is more reasonable."

There is nothing to suggest that the Corps' prior comments on an earlier draft of the Road Commission's application meant that the Corps would never grant the permit or that the Road Commission could not resolve the issues prompting those comments. And even if the Road Commission's interpretation of a snide email from an EPA employee to a Corps employee is accurate, the email is not sufficient to show that the Corps had predetermined that it would never grant the Road Commission a permit.

IV.

For the foregoing reasons, we AFFIRM the judgment of the district court.